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PROHIBITING JURORS FROM WORKING AS TRIAL CONSULTANTS IN RETRIALS: A CAREFUL BALANCING ACT BETWEEN THE FIRST AND SIXTH AMENDMENTS

I. INTRODUCTION

Imagine that you have just been selected for jury duty in the retrial of a high-profile defendant. You are aware that after the first trial resulted in a mistrial, members of the jury were approached by the defense lawyer and asked to work as trial consultants in the retrial. They received fifty dollars per hour as compensation for their consulting services, in addition to a five hundred dollar retainer fee. You are currently unemployed and receive twelve dollars per hour as compensation for serving as a juror. When the time comes to deliberate, would the knowledge that you could receive fifty dollars per hour to work as a trial consultant in the event that the case ends in a mistrial influence you to change your vote?

The District Attorney of Orange County, California, and two California state legislators say “yes”—the possibility of a juror intentionally creating a mistrial to secure work as a consultant in the retrial is very real.¹ To combat this threat, they proposed the Jury Integrity Act, which would make it a crime for a former juror to receive compensation for working as a trial consultant in a retrial.² Although the bill died in committee, the issue of lawyers hiring former jurors to work as trial consultants in retrials has sparked debate within the legal community and raised serious legal and ethical questions.³

1. The Orange County District Attorney, Tony Rackauckas, along with former California State Assemblyman Lou Correa, D-Santa Ana, and California State Senator Dick Ackerman, R-Tustin, have adamantly opposed the practice of lawyers hiring former jurors to work as trial consultants in retrials. See Rachanee Srisavasdi, *DA Opposes Paying Ex-Jurors To Consult*, ORANGE COUNTY REG., July 20, 2004, at Local1. Rackauckas has referred to this strategy as “an outrageous attack on the integrity of the jury system.” *Id.*

2. H.R. 473, 2003–2004 Gen. Assem., Reg. Sess. (Cal. 2004) (proposed amendment to CAL. PENAL CODE § 116.5), available at <http://www.leginfo.ca.gov/billinfo.html>.

3. See Diane Curtis, *Paying Jurors: Savvy Trial Strategy—Or Attack On The Jury System?*, CAL. B. J., Jan. 2005, at 1 (discussing the legal and ethical issues raised by lawyers hiring former jurors to work as trial consultants in retrials).

Many lawyers are surprised to learn that other lawyers have hired former jurors to work as trial consultants in retrials.⁴ Their reactions are mixed: while some view it as a good strategy,⁵ others view it as bordering on unethical.⁶ The controversy surrounding the issue of lawyers hiring former jurors to work as trial consultants in retrials is not new; in fact, it began more than two decades ago.⁷ In a high-profile 1985 Connecticut rape case, a defense lawyer hired a former juror to consult in the retrial of his client, causing a stir in the legal community.⁸ In response, the Connecticut Legislature passed a state law prohibiting jurors from accepting compensation for working as trial consultants in retrials.⁹ Until recently, the issue has not received much attention.¹⁰ Last summer, however, the defense lawyer in a high-profile California rape case hired several former jurors to work as trial consultants in the retrial, once again stirring up controversy and inspiring the introduction of the Jury Integrity Act.¹¹ Several years earlier, a California law that

4. See Stephanie Francis Ward, *Former Jurors To Be Consultants—Defense is Hiring Them For Help in Gang-Rape Retrial*, 30 A.B.A. J. E. REP., July 30, 2004, at 2 (interviewing several lawyers who consider it a “novel” strategy). The author is unaware of any studies addressing the breadth of the problem.

5. Curtis, *supra* note 3, at 1 (noting one Los Angeles attorney who has called the strategy “brilliant lawyering that is consistent with defense lawyer duties’ to do everything possible to defend their clients”).

6. *Id.* (interviewing several legal ethics professors who have expressed concern about the possible negative effects of paying former jurors to work as trial consultants in retrials).

7. See George Gombossy, *Ex-Juror Retained as Trial Consultant*, NAT’L L.J., Dec. 30, 1985, at 3.

8. For a “nominal fee,” defense lawyer Michael Sherman hired one of the jurors who had voted for acquittal in the first trial to consult in the second trial. Although his client was ultimately found guilty, Sherman stated that using the juror was still “worthwhile.” See Gombossy, *supra* note 7, at 3.

9. CONN. GEN. STAT. ANN. § 51-247(b) (West 2005). This Connecticut State Law became known as the “Sherman Act,” named after defense lawyer Michael Sherman. Leonard Post, *Hiring Former Jurors as Trial Consultants Catches On*, NAT’L L.J., Aug. 16, 2004, at 6.

10. The issue of lawyers hiring former jurors to work as trial consultants in retrials last received media attention in a 1999 Florida murder case. When that case ended in a hung jury, one of the jurors, a lawyer who was convinced that the defendant was innocent, offered to work with the defense without compensation. The defendant was later acquitted after the lawyer/former juror helped the defense poke holes in the prosecution’s evidence. Michael D. Goldhaber, *Thinking Out of the Jury Box: Lawyer-Juror on Hung Panel Joins the Defense for Retrial*, NAT’L L.J., July 26, 1999, at A1.

11. The background of this high-profile California rape case is as follows: Gregory Haidl, the seventeen-year-old son of a wealthy Orange County, California, Assistant Sheriff, and two of his friends, allegedly gang-raped an unconscious sixteen-year-old girl and videotaped it. After a two-month trial, the jury deadlocked. Eight former jurors then worked as trial consultants for the defense in the retrial, as well as professional trial consultant Jo Ellen Dimitrius, who served as a trial consultant in both the O.J. Simpson

banned all post-verdict contact with jurors had been struck down as unconstitutional in violation of the First Amendment right to free speech.¹² Unlike that previous law, the Jury Integrity Act would have regulated lawyers' post-verdict contact with jurors in a manner that would have protected both criminal defendants' Sixth Amendment rights to a fair trial and an impartial jury¹³ and lawyers' and jurors' First Amendment right to free speech.¹⁴

This Comment, beginning with Part II, offers a brief overview of the role of trial consultants in trial preparation, explaining who trial consultants most often are and what services they provide. Part III discusses two general criticisms of trial consulting: (1) it interferes with criminal defendants' Sixth Amendment rights to a fair trial and an impartial jury; and (2) it contributes to public distrust in the jury system. Part IV will then discuss additional criticisms that are particular to lawyers hiring former jurors to work as trial consultants in retrials. Part V will examine two state laws intended to prohibit lawyers from hiring former jurors to work as trial consultants in retrials and explain why California's broad ban on post-trial juror contact was overturned on constitutional grounds while Connecticut's specific ban is still good law today. Finally, Part VI will recommend that all states adopt a law similar to California's proposed Jury Integrity Act, prohibiting former jurors from accepting any form of compensation to work as trial consultants, but giving them the option to do so without compensation. This proposed rule effectively balances the constitutional rights of all those affected in several respects. On the one hand, it protects lawyers' and jurors' First Amendment right to free speech by giving former jurors the option of working with lawyers as trial consultants in retrials

criminal trial and the Scott Peterson trial. Post, *supra* note 9, at 6. The former jurors received fifty dollars per hour plus a five hundred dollar retainer fee for their consulting services. Curtis, *supra* note 3, at 1. In retaliation, the prosecution hired its own trial consultant. Rachanee Srisavasdi, *Consultant Aids DA in Haidl Case*, ORANGE COUNTY REG., Feb. 1, 2005, at Local2. On March 23, 2005, the jury found the defendants guilty of sexual assault. Ben Fox, *3 Found Guilty in OC Sex Case*, DAILY BREEZE, March 24, 2005, at A7. Sentencing is expected in fall 2005. Claire Luna, *Gang-Sex Sentence Delayed Until Fall*, L.A. TIMES, May 7, 2005, at B3.

12. See *Dove Audio, Inc. v. Lungren*, No. CV 95-2570 RG (JRX), 1995 WL 432631, at *2 (C.D. Cal. June 14, 1995) (holding that section 116.5 of the California Penal Code as it applied to jurors was overbroad and not necessary to serve a compelling state interest).

13. U.S. CONST. amend. VI (providing, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed").

14. U.S. CONST. amend. I (providing, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press").

without compensation. On the other hand, it protects criminal defendants' Sixth Amendment rights to a fair trial and an impartial jury by eliminating a potential profit motive for jurors to intentionally deadlock and create a mistrial to secure a consulting job in the retrial.

II. A BRIEF OVERVIEW OF THE TRIAL CONSULTING INDUSTRY

The trial consulting industry first emerged in high-profile political trials of the early 1970s.¹⁵ In those cases, defense lawyers representing anti-war activists hired social scientists to work as trial consultants.¹⁶ Today, trial consulting is a multi-million dollar industry.¹⁷ Not only do large corporations now use trial consultants on a regular basis, wealthy criminal and civil defendants, including several notable celebrities, do as well.¹⁸

While trial consultants are most often psychologists, they may also be sociologists, lawyers, people with communications or marketing backgrounds, or people with no formal training at all.¹⁹ Traditionally, a trial consultant's role was limited to assisting in voir dire.²⁰ Today, however, trial consultants may provide lawyers with advice on anything from voir dire to actual trial strategy.²¹ Some of the services that trial consultants have been known to provide include producing visual aids, preparing witnesses, drafting prospective juror questionnaires, conducting focus groups and mock trials, completing community

15. Maureen E. Lane, *Twelve Carefully Selected Not So Angry Men: Are Jury Consultants Destroying the American Legal System?*, 32 SUFFOLK U. L. REV. 463, 472 (1999).

16. See *id.* (citing *United States v. Berrigan*, 482 F.2d 171 (3d Cir. 1973) as an example of such a trial).

17. Lane, *supra* note 15, at 472 n.70.

18. Franklin Strier, *Paying the Piper: Proposed Reforms of the Increasingly Bountiful But Controversial Profession of Trial Consulting*, 44 S.D. L. REV. 699, 700 n.8 (1998) (noting that trial consultants have been credited with helping to achieve favorable outcomes in many high-profile cases, such as the O.J. Simpson criminal trial, the Rodney King trial, the Menendez Brothers trial, the trial of New York "subway vigilante" Bernard Goetz, and the McDonald's "hot coffee" trial).

19. Franklin Strier & Donna Shestowsky, *Profiling the Profilers: A Study of the Trial Consulting Profession, Its Impact on Trial Justice and What, If Anything, To Do About It*, 1999 WIS. L. REV. 441, 445 (1999). See Diana G. Ratcliff, *Using Trial Consultants: What Practitioners Need to Know*, 4 J. LEGAL ADVOC. & PRAC. 32, 34 n.17 (2002) (noting that in a 2001 Alabama murder case, the prosecution's consulting team included a screenwriter who helped tell the story to the jury).

20. Stephanie Leonard Yarbrough, *The Jury Consultant—Friend or Foe of Justice*, 54 SMU L. REV. 1885, 1888 (2001).

21. See Lane, *supra* note 15, at 473-74 (noting that "jury selection consultants employ a variety of 'scientific jury selection methods' derived from the social sciences").

surveys, and handling settlement discussions.²² Whatever their function in a particular case, trial consultants have increasingly come under fire from members of the legal community for a variety of reasons discussed below in Part III.

III. CRITICISMS OF TRIAL CONSULTANTS

Some lawyers consider trial consultants to be an absolutely essential element of trial preparation, especially in high-profile cases.²³ Other lawyers question the effectiveness of trial consultants, likening them to “security blanket[s]” for lawyers who “are always worried about the outcome of a case.”²⁴ And other lawyers criticize trial consulting as an “unethical” practice that interferes with criminal defendants’ constitutional rights.²⁵ While some of these criticisms apply to lawyers’ hiring trial consultants in general, other criticisms specifically apply to lawyers’ hiring former jurors to work as trial consultants in retrials.

A. Criticisms of Trial Consultants in General

There are two main criticisms of lawyers hiring trial consultants in general. First, some critics argue that the practice interferes with criminal defendants’ Sixth Amendment rights to a fair trial and an impartial jury.²⁶ Second, other critics argue that trial consultants contribute to public distrust in the jury system and in the court system in general.²⁷

22. Yarbrough, *supra* note 20, at 1889-95.

23. See Strier & Shestowsky, *supra* note 19, at 443. For example, one Boston trial lawyer commented that “[n]o self-respecting trial lawyer will go through the process of jury selection in an important case without the assistance of highly paid trial consultants.” *Id.* at 443 n.2 (alteration in original) (quoting Gordon T. Walker). Similarly, a New York lawyer commented that “[i]t’s gotten to the point where if the case is large enough, it’s almost malpractice not to use [trial consultants].” *Id.*

24. Pamela Griner Leavy & Krista Reiner, *Lawyers Use Trial Consultants to Fine-Tune Tough Cases*, TAMPA BAY BUS. J., May 26, 2000, at 15.

25. See Strier & Shestowsky, *supra* note 19, at 474.

26. *Id.* at 474-75.

27. Debra Stahler, *Scientifically Selecting Jurors While Maintaining Professional Responsibility: A Proposed Model Rule*, 6 ALB. L.J. SCI. & TECH. 383, 398-99 (1996); Strier & Shestowsky, *supra* note 19, at 472-73, 478.

1. Right to a Fair Trial and an Impartial Jury

One of the main criticisms of trial consulting is that it interferes with criminal defendants' Sixth Amendment rights to a fair trial and an impartial jury.²⁸ Critics have suggested that trial consulting interferes with these rights because its excessive costs make it available only to the wealthy.²⁹ Trial consultants have been known to cost as much as one million dollars in some high-profile cases.³⁰ Thus, critics argue that the exorbitant costs of trial consulting, combined with the exorbitant costs of hiring lawyers, investigators, and expert witnesses, results in the wealthy enjoying a substantial advantage in criminal trials, thus interfering with criminal defendants' Sixth Amendment rights to a fair trial and an impartial jury.³¹

This criticism, however, is not so much a criticism of trial consulting per se as it is a criticism of the economic realities of our legal system in general.³² Trial consulting advocates argue that the entire legal system is flawed: the fact that only the wealthy can afford to hire trial consultants is no less fair than the fact that only the wealthy can afford to hire more lawyers, investigators, and expert witnesses.³³ Trial consulting advocates argue that the critics should consider the "big picture" and keep in mind that there are many flaws inherent in our legal system.³⁴ These flaws, in addition to the "novel" strategies employed by some trial consultants, have contributed to a general public distrust in the jury system and in the court system in general.³⁵

28. Strier & Shestowsky, *supra* note 19, at 474-75.

29. Strier & Shestowsky raise two questions: (1) "Does allowing government, large corporations, and wealthy individuals to have such an advantage over their opponents undermine the very foundation of a fair trial?"; and (2) "Might not the resulting competitive disadvantages of poorer litigants have a chilling effect on the exercise of their constitutional rights?" *Id.* at 474.

30. Harvey Moore, owner of Trial Practices, a trial consulting firm in Tampa Bay, Florida, typically charges \$6500 for a focus group, \$20,000 for a mock trial, and up to \$1,000,000 for a variety of services in larger cases. Leavy & Reiner, *supra* note 24, at 15.

31. See Strier & Shestowsky, *supra* note 19, at 475-76.

32. See *id.* at 475 (noting that "what is 'unfair' about trial consulting is a metaphor for what is unfair about the adversary system as a whole").

33. See *id.* at 475-76.

34. See *id.*

35. See *id.*

2. Public Perception and Trust in the Jury System

A second criticism of trial consulting is that it contributes to a general public distrust in the jury system.³⁶ Critics argue that the public views juries as “manipulated by psychological devices” and views trial consulting as “high-tech jury tampering.”³⁷ In addition, claims by trial consultants that they have the ability to control the outcome of cases have contributed to the public’s perception that lawyers can, and often do, manipulate the jury and disregard defendants’ constitutional rights.³⁸

Critics also argue that the fact that trial consulting is an unregulated industry contributes to public distrust in the jury system.³⁹ There are neither licensing requirements to become a trial consultant nor continuing education requirements.⁴⁰ Because there are no requirements to become a trial consultant, some critics argue that it is inevitable that “untrained, incompetent, and unscrupulous individuals [will] advertise and practice with impunity.”⁴¹ Thus, they argue, the trial consulting industry is open to scam artists who promote themselves by making unrealistic promises and claims.⁴² Not only does this result in public distrust in the jury system, but also potential harm to criminal defendants’ Sixth Amendment rights to a fair trial and an impartial jury. These two criticisms also extend to lawyers hiring former jurors to work as trial consultants in retrials.

B. Criticisms of Lawyers Hiring Former Jurors to Work as Trial Consultants in Retrials

Many of the criticisms of lawyers hiring former jurors to work as trial consultants in retrials include the same criticisms discussed above concerning trial consultants in general.⁴³ There are three potential criticisms, however, that are unique to the practice of lawyers hiring

36. *Id.* at 472-73 (noting that the “appearance of justice is as important as the reality in order to preserve and maintain public support for an instrument or an institution of justice”).

37. *Id.*

38. Stahler, *supra* note 27, at 398-99 (arguing that trial consultants’ jury selection methods erode the impartial jury requirement of the Sixth Amendment).

39. Strier & Shestowsky, *supra* note 19, at 478.

40. *Id.*

41. *Id.*

42. Strier, *supra* note 18, at 703.

43. *See supra* Part III.A.1-2.

former jurors to work as trial consultants in retrials.⁴⁴ First, this practice interferes with freedom of debate during jury deliberations. Second, it interferes with jurors' rights to privacy. And finally, it gives jurors a profit motive to intentionally deadlock and create a mistrial, thereby violating criminal defendants' Sixth Amendment rights.⁴⁵

1. Freedom of Debate During Jury Deliberations

One potential criticism of lawyers hiring former jurors to work as trial consultants in retrials is that it may interfere with freedom of debate during jury deliberations. An established part of the jury system is that the jury deliberates in private, the purpose of which is to encourage free debate.⁴⁶ Justice Cardozo reflected on the importance of private deliberations and jury secrecy when he stated that "[f]reedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world."⁴⁷ Freedom of debate has also been said to "promote good group dynamics within a jury, whereby jury members exchange ideas and concerns to reach a verdict that reflects community mores."⁴⁸ Human nature suggests that a juror is less likely to make an argument during deliberations that may be embarrassing or dangerous if he or she believes that other jurors may expose that argument to someone else.⁴⁹ Thus, allowing jurors to expose private jury

44. These potential criticisms that are unique to lawyers hiring former jurors to work as trial consultants in retrials are based in part on other commentators' criticisms of juror post-verdict contact with the media.

45. See, e.g., Curtis, *supra* note 3, at 1 (quoting a legal ethics professor who notes that "[i]f there is the possibility of an economic reward at the end of a trial[,] . . . 'this is a motivation that makes [him] believe [that jurors are] not going to be fair and impartial'"); Ward, *supra* note 4, at 2 (quoting Tony Rackauckas, the district attorney of Orange County, who notes that "[i]f it got to be common for one party or another to hire jurors from a case, that would be bad because it would put in a financial motive for jurors to vote in a certain way").

46. Abraham S. Goldstein, *Jury Secrecy and the Media: The Problem of Postverdict Interviews*, 1993 U. ILL. L. REV. 295, 295-96 (1993). Goldstein has suggested that although the Supreme Court has not yet explicitly stated that juror privacy and freedom of debate during deliberations are "integral" to the jury trial, a "group of practices and doctrines has evolved over the years that would be mustered in support of such a conclusion." *Id.* at 297. This includes "limiting impeachment of jury verdicts, favoring a general verdict, and overlooking inconsistency in jury verdicts." *Id.*

47. *Clark v. United States*, 289 U.S. 1, 13 (1933).

48. Alison Markovitz, *Jury Secrecy During Deliberations*, 110 YALE L.J. 1493, 1507 (2001).

49. See William R. Bagley, Jr., *Jury Room Secrecy: Has the Time Come to Unlock the*

deliberations to others can potentially interfere with criminal defendants' Sixth Amendment rights to a fair trial and an impartial jury.

Some critics have argued that jurors should be considered "government employees," a group whose rights to freedom of debate courts have placed great importance on protecting.⁵⁰ Assuming that jurors are considered "government employees" while serving jury duty, their speech can be restricted when it is "disruptive to the workplace."⁵¹ In determining whether it is "disruptive to the workplace," courts can consider "whether the employee's speech undermined the authority of superiors, disturbed harmony among colleagues, interfered with regular operations, impaired the employee's performance of his or her duties, or had a detrimental impact on the close working relationships for which loyalty and confidence are necessary."⁵² Thus, one could argue that the possibility of jurors discussing deliberations with the public, or with lawyers post-trial, would "disturb the harmony" among the jurors during deliberations and detrimentally impact the relationships between them.⁵³ The result is a paradox: restricting post-verdict contact with jurors may interfere with jurors' First Amendment right to free speech, but it also encourages free speech in the jury deliberation room.⁵⁴ In addition to encouraging free speech and freedom of debate during jury deliberations, restricting post-verdict contact with jurors also protects juror privacy.

2. Juror Privacy Issues

A second potential criticism of lawyers hiring former jurors to work as trial consultants in retrials is that lawyers who request information from former jurors may interfere with jurors' right to privacy. The right

Door?, 32 SUFFOLK U. L. REV. 481, 500-01 (1999); Markovitz, *supra* note 48, at 1507.

50. See, e.g., *Connick v. Myers*, 461 U.S. 138, 149 (1983) (holding that the district attorney's questionnaire was so disruptive to the regular operations of the office that her discharge did not violate the First Amendment); *Dicks v. City of Flint*, 684 F. Supp. 934, 940-41 (E.D. Mich. 1988) (holding that a deputy city administrator who violated a mayor's policies could be denied a position in the mayor's administration without violating the First Amendment).

51. Nancy S. Marder, *Deliberations and Disclosures: A Study of Post-Verdict Interviews of Jurors*, 82 IOWA L. REV. 465, 520-21 (1997) (noting that "it is unclear how to categorize jurors for the purposes of First Amendment analysis," and questioning whether "jurors [are] like other government employees whose speech can be constrained by virtue of their jobs").

52. *Id.* at 521.

53. See *id.*

54. *Id.* at 522 (noting that "the First Amendment may be most fully realized when individual juror speech is curtailed").

to privacy has historically been considered one of the most important.⁵⁵ Jurors' right to privacy issues are often raised in the context of post-verdict interviews of jurors by the media.⁵⁶ In some high-profile cases, the media has interfered with jurors' right to privacy by going to great extremes to interview former jurors.⁵⁷ Oftentimes, these high-profile cases are extremely long or emotionally draining, and jurors are eager to get back to their normal lives.⁵⁸ Just as the media often interferes with jurors' right to privacy by seeking post-verdict interviews, lawyers may interfere with this right by seeking information from jurors to assist them in the retrial.

Jurors' right to privacy issues are also raised when one juror discusses with someone else another juror's arguments during deliberations.⁵⁹ If a juror chooses to speak with the media, a lawyer, or anyone else, concerning another juror's argument during deliberations, he or she may jeopardize that other juror's right to privacy, especially if referring to that juror by name.⁶⁰ Individual juror's arguments during deliberations are similar to the private communications between members of the Supreme Court and between law clerks and other court personnel.⁶¹ Just as the First Amendment does not allow the media the right to the private communications between members of the court and their employees, it does not allow the media or lawyers the right to private communications between jurors.⁶²

3. Profit Motive to Intentionally Create a Mistrial

The most common criticism of lawyers hiring former jurors to work as trial consultants in retrials is that it gives jurors a profit motive to

55. The right of personal privacy, that is, "the right to be let alone" has been called "the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

56. Markovitz, *supra* note 48, at 1506 (noting that current discussions of post-verdict jury secrecy are largely focused on intrusions by the media).

57. See Marder, *supra* note 51, at 488-89 (citing several instances in high-profile trials where jurors were forced to leave town, call the police, or take other steps to avoid harassment by the media).

58. *Id.* at 505.

59. See *United States v. Franklin*, 546 F. Supp. 1133, 1142 (N.D. Ind. 1982) (noting that "[i]t is very possible for one juror to engage in post-trial violations of the privacy of another"); see also Marder, *supra* note 51, at 489.

60. See Marder, *supra* note 51, at 505.

61. *Franklin*, 546 F. Supp. at 1143.

62. See *id.*

intentionally deadlock and create a mistrial to secure a consulting job in the retrial.⁶³ This fear was the basis of the recently proposed Jury Integrity Act in California that would have prohibited jurors from accepting compensation for trial consulting in retrials.⁶⁴ The idea of jurors intentionally deadlocking and creating a mistrial to secure a consulting job in the retrial is not inconceivable. Jurors in high-profile cases have often taken advantage of opportunities to profit in what has been labeled “checkbook journalism.”⁶⁵ Some jurors have held press conferences, written books, sold their stories to the press, and appeared on news programs or on talk shows.⁶⁶ Thus, some critics argue that jurors could intentionally create a verdict that would make a “good ending” to the case to benefit from the publicity,⁶⁷ just as jurors could intentionally create a verdict that would allow them to benefit financially by working as trial consultants in the retrial.⁶⁸ Not only would jurors intentionally deadlocking and creating a mistrial violate public policy, it would also interfere with criminal defendants’ Sixth Amendment rights to a fair trial and an impartial jury.

The profit motive that jurors now have to intentionally deadlock and

63. See Curtis, *supra* note 3, at 1; Gombossy, *supra* note 7, at 6; Post, *supra* note 9, at 6; Srisavasdi, *supra* note 1, at Local1; Ward, *supra* note 4, at 2.

64. Orange County District Attorney Tony Rackauckas, who proposed the Jury Integrity Act, has stated the following:

I don't agree that [the defense] hired [the former jurors] for the purpose of learning about the issues of the trial or for their expertise. I think the reason they're doing it is that they want to signal to the next jury that if you vote in favor of Gregory Haidl, you can get on the Haidl payroll.

Ward, *supra* note 4, at 2.

65. Copernicus T. Gaza, *Getting Inside the Jury's Head: Media Access to Jurors After the Trial*, 12 N.Y.L. SCH. J. HUM. RTS. 311, 335 (1995). The origin of the term “checkbook journalism” is unknown. James R. Cady, *Bouncing “Checkbook Journalism:” A Balance Between the First and Sixth Amendments in High-Profile Criminal Cases*, 4 WM. & MARY BILL RTS. J. 671, 671 n.2 (1996).

66. Gaza, *supra* note 65, at 335-36 (citing two examples of jurors benefiting from the publicity: (1) the Bernard Goetz “subway vigilante” case, in which two jurors were paid \$2500 and another was paid \$5000 for their stories; and (2) the Pennzoil-Texaco case, in which a juror wrote a book defending the ten billion dollar award and received an advance of \$10,000 from his publisher).

67. See *id.* at 336. But see Nicole B. Casarez, *Examining the Evidence: Post-Verdict Interviews and the Jury System*, 25 HASTINGS COMM. & ENT. L.J. 499, 554 (2003) (arguing that there is “no evidence, nor do critics provide any, that a juror has ever changed the outcome of a case, disregarded probative evidence, or successfully arranged to be chosen for jury service to further his or her commercial interests”).

68. See Curtis, *supra* note 3, at 1; Gombossy, *supra* note 7, at 6; Post, *supra* note 9, at 6; Srisavasdi, *supra* note 1, at Local1; Ward, *supra* note 4, at 2.

create mistrials poses another problem: Assuming that the practice of lawyers hiring former jurors to work as trial consultants in retrials catches on, what would be the next step?⁶⁹ One commentator has suggested that a "bidding war" could potentially result, whereby the district attorney would offer to pay the former juror more money than the defense lawyer, the defense lawyer would make a counteroffer, and so on.⁷⁰ Not only would this result be contrary to public policy, it would stretch the already limited resources of the court and add to the public's distrust in the jury system and in the court system in general. Nevertheless, some commentators still argue that allowing lawyers to hire former jurors to work as trial consultants in retrials is beneficial to society.

C. Potential Benefits to Allowing Lawyers to Hire Former Jurors to Work as Trial Consultants in Retrials

Despite the criticism, one could argue that there are some potential benefits to allowing lawyers to hire former jurors to work as trial consultants in retrials. However, I argue that most of these "benefits" do not outweigh the potential problems that this practice could create.⁷¹ One argument is that allowing lawyers to receive feedback from jurors is an "educational tool" that helps lawyers improve their skills and better represent their clients in the future.⁷² While this may be true, there are numerous less problematic ways for lawyers to improve their skills,⁷³ and several courts have held that lawyers should not use former jurors for this purpose.⁷⁴

69. Srisavasdi, *supra* note 1, at Local1 (noting this potential problem raised by California assemblyman Lou Correa).

70. *Id.*

71. *See supra* Part III.A-B.

72. Karlene S. Dunn, *When Can An Attorney Ask: "What Were You Thinking?"—Regulation of Attorney Post-Trial Communication With Jurors After Commission for Lawyer Discipline v. Benton*, 40 S. TEX. L. REV. 1069, 1079 n.47 (1999).

73. For example, lawyers can use a "shadow jury;" that is, a group of people who observe the trial and fill out surveys at the end of each day. A shadow jury would arguably give lawyers the same kind of feedback on their litigation skills that former jurors would give them.

74. *See, e.g., Haeberle v. Texas Int'l Airlines*, 739 F.2d 1019, 1020 (5th Cir. 1984) (denying a lawyer's request to "learn 'some lesson' about the basis for its verdict adverse to his client"); *In re Delgado*, 306 S.E.2d 591, 594 (S.C. 1983) (holding that "[t]he argument that counsel wishes to talk to a juror in an effort to improve his trial skills is more often an excuse and not a good reason"); *Sixberry v. Buster*, 88 F.R.D. 561, 561 (E.D. Pa. 1980) (holding that a lawyer may not attempt to "improve his skills as a trial lawyer by ascertaining from the

A second argument is that post-verdict contact between lawyers and jurors is beneficial because it may lead to the discovery of evidence of improper jury conduct, jury tampering, or other kinds of jury tainting.⁷⁵ Most courts have in fact agreed with this argument and do allow lawyers in limited circumstances to question former jurors about jury misconduct for the purpose of impeaching a verdict.⁷⁶

A third argument is that hiring former jurors to work as trial consultants in retrials is just “good lawyering” on the part of defense lawyers who have ethical obligations to make reasonable efforts to defend their clients.⁷⁷ Proponents argue that hiring former jurors does not technically violate any ethical rules, and the possibility of a juror intentionally deadlocking and creating a mistrial to secure a consulting job in the retrial is very remote.⁷⁸ While it may be true that the practice of lawyers hiring former jurors to work as trial consultants in retrials does not technically violate any ethical rules, it will likely contribute to the public’s distrust in the jury system.⁷⁹ Similarly, while it may be true that the possibility of a juror intentionally deadlocking and creating a mistrial to secure a consulting job in the retrial is very remote, the profit motive in high-profile cases still exists and could potentially interfere with criminal defendants’ Sixth Amendment rights.⁸⁰ The question, then, is do we want to take this chance? Some courts and state

jurors which facets of the trial influenced their verdict”).

75. Professor Goldstein has offered this description of “improper jury conduct:”

Under the most common formulation of the impeachment rule, jurors may testify after the verdict only to “extraneous influences” on them . . . includ[ing] illegal methods of decision, such as casting lots or being bound by a majority vote; the use of personal knowledge, such as unauthorized inspections of the scene of an accident or a crime; or expressions by the judge of a desire for a conviction.

Goldstein, *supra* note 46, at 299.

76. *See, e.g.,* King v. United States, 576 F.2d 432, 439 (2d Cir. 1978) (noting that “a district judge may provide that questioning of jurors after a verdict be conducted only under supervision of the trial court”); United States v. Riley, 544 F.2d 237, 242 (5th Cir. 1976), *cert. denied*, 430 U.S. 932 (1977) (refusing to allow a lawyer to interview a former juror because “interrogations of jurors have not been favored by federal courts except where there is some showing of illegal or prejudicial intrusion into the jury process”) (emphasis in original).

77. Curtis, *supra* note 3, at 1 (noting one lawyer’s comment that “when you’re being prosecuted by the state, the state has so much power, and you’re just a mere human being. You have to make the scales a little more equal”).

78. *Id.* (noting one lawyer’s opinion that it is a “long shot” that a juror would intentionally deadlock and create a mistrial to secure a consulting job in the retrial).

79. *See supra* Part III.A.2.

80. *See supra* Part III.B.3.

legislatures have answered "no" and responded with laws restricting post-verdict contact with jurors.

IV. PAST ATTEMPTS TO RESTRICT POST-VERDICT CONTACT WITH JURORS

When lawyers have hired former jurors to work as trial consultants in retrials in the past, a great deal of publicity and debate about the legal and ethical issues has resulted.⁸¹ Some federal courts, state courts, and state legislatures have responded by restricting or completely prohibiting post-verdict contact with jurors.⁸² However, almost all complete prohibitions on post-verdict contact have now been repealed on First Amendment grounds.⁸³

A. Court Attempts to Restrict Post-Verdict Contact With Jurors

Courts have restricted three types of post-verdict contact with former jurors: (1) interviews by lawyers for the purpose of obtaining evidence of jury misconduct to impeach the verdict;⁸⁴ (2) interviews by

81. See Goldhaber, *supra* note 10, at A1 (discussing the reaction in the Florida legal community after a former juror/lawyer joined the defense team in the retrial); Gombossy, *supra* note 7, at 3 (discussing the reaction in the Connecticut legal community to the news that defense lawyer Michael Sherman had hired a former juror to consult in a retrial).

82. See, e.g., *United States v. Brown*, 250 F.3d 907, 919 (5th Cir. 2001) (upholding court order banning post-verdict juror interviews concerning deliberations); *United States v. Harrelson*, 713 F.2d 1114, 1115 (5th Cir. 1983), *cert. denied*, 465 U.S. 1041 (1984) (completely prohibiting post-verdict contact with jurors). See also CAL. PENAL CODE § 116.5 (West 1999) (prohibiting anyone from compensating jurors or jurors from accepting compensation for information about the trial within ninety days of the end of the trial); CONN. GEN. STAT. ANN. § 51-247(b) (West 2005) (prohibiting former jurors from receiving compensation for consulting in a retrial or in a "separate trial arising out of the same transaction or offense").

83. See *Globe Newspaper Co. v. Hurley*, 920 F.2d 88, 97-98 (1st Cir. 1990) (overruling district court's ban on jurors talking to press and allowing for a ban only where "exceptional circumstances peculiar to the case" exist); *United States v. Franklin*, 546 F. Supp. 1133, 1145 (N.D. Ind. 1982) (repealing complete ban on post-verdict interviews and modifying order to prohibit jury interviews on the courthouse premises, post-verdict jury interviews by attorneys and parties, and declaring that it is the jurors' own decision whether he or she chooses to grant an interview). See also *Dove Audio*, 1995 WL 43261, at *1 (overruling section 116.5 of the California Penal Code as it applied to jurors because it was overbroad).

84. See, e.g., *King v. United States*, 576 F.2d 432, 439 (2d Cir. 1978) (holding that "a district judge may provide that questioning of jurors after a verdict may be conducted only under the supervision of the trial court" to obtain evidence of jury misconduct); *United States v. Riley*, 544 F.2d 237, 242 (5th Cir. 1976), *cert. denied*, 430 U.S. 932 (1977) (refusing to allow a lawyer to interview a former juror because "interrogations of jurors have not been favored by federal courts except where there is some showing of illegal or prejudicial intrusion into

the media in high-profile cases for the purpose of informing the public about the specific trial or about a “day in the life” of a juror;⁸⁵ and (3) interviews by lawyers for the purpose of improving the lawyer’s skills or effectiveness, whether in a retrial or in future unrelated trials.⁸⁶ Courts have taken several different approaches on the issue of post-verdict contact with jurors, struggling to achieve a balance between protecting criminal defendants’ Sixth Amendment rights to a fair trial and an impartial jury while protecting lawyers’, jurors’, and the media’s First Amendment right to free speech.⁸⁷

One such approach taken by an increasing number of courts is to completely ban post-verdict juror contact.⁸⁸ Another approach is to prohibit post-verdict juror contact unless the juror consents,⁸⁹ the

the jury process”) (emphasis in original).

85. See, e.g., *United States v. Cleveland*, 128 F.3d 267, 271 (5th Cir. 1997) (holding that post-verdict media interviews with jurors that discuss deliberations are prohibited, but discussing general reactions is allowed); *United States v. Antar*, 38 F.3d 1348, 1364 (3d Cir. 1994) (holding that jurors may choose to give interviews with the media post-verdict, but they may not discuss the opinions of other deliberating jurors); *State v. Neulander*, 801 A.2d 255, 259 (N.J. 2002), *cert. denied*, 537 U.S. 1192 (2003) (holding that the media is prohibited from contacting former jurors for post-verdict interviews and former jurors are also prohibited from contacting the media).

86. See, e.g., *Haerberle v. Texas Int’l Airlines*, 739 F.2d 1019, 1020 (5th Cir. 1984) (denying a lawyer’s request to “learn ‘some lesson’ about the basis for its verdict adverse to his client”); *In re Delgado*, 306 S.E.2d 591, 594 (S.C. 1983) (holding that “[t]he argument that counsel wishes to talk to a juror in an effort to improve his trial skills is more often an excuse and not a good reason”); *Sixberry v. Buster*, 88 F.R.D. 561, 561 (E.D. Pa. 1980) (holding that a lawyer may not attempt to “improve his skills as a trial lawyer by ascertaining from the jurors which facets of the trial influenced their verdict”).

87. For example, in *Journal Publ’g Co. v. Mechem*, 801 F.2d 1233, 1236 (10th Cir. 1986), the Tenth Circuit struggled to achieve a balance between protecting Sixth Amendment and First Amendment rights. The court held that it “must narrowly tailor any prior restraint and must consider any reasonable alternatives to that restraint which have a lesser impact on First Amendment rights.” *Id.*

88. See *State v. Neulander*, 801 A.2d 255, 259 (N.J. 2002), *cert. denied*, 537 U.S. 1192 (2003) (affirming a trial court order prohibiting the media from contacting or interviewing jurors, and prohibiting the media from releasing the identity or descriptions of jurors); see also *Northern Pac. Ry. Co. v. Mely*, 219 F.2d 199, 202 (9th Cir. 1954) (holding that “it is improper and unethical for lawyers . . . to interview jurors to discover what was the course of deliberation of a trial jury”); *Sixberry v. Buster*, 88 F.R.D. 561, 562 (E.D. Pa. 1980) (holding that “[i]f the purpose of counsel is the improvement of his capabilities as a trial attorney, which is a desirable and most laudable endeavor, unfortunately the court does not feel that granting this motion would further that worthy ambition”); *Florida Bar v. Newhouse*, 498 So. 2d 935, 936 (Fla. 1986) (holding that “[t]he post-trial questioning of jurors concerning the thought processes, calculations, or judgments involved in jury deliberations can only serve to hamper the effective administration of justice”).

89. For example, in *Globe Newspaper Co. v. Hurley*, 920 F.2d 88, 90 (1st Cir. 1990), the trial judge issued the following statement to jurors:

contact is for a lawful purpose,⁹⁰ or the lawyer receives permission from the court.⁹¹ And yet another approach taken by at least one court is to allow post-verdict contact if the juror has not been subjected to repeated requests for interviews that could be considered harassment or an invasion of the juror's privacy.⁹²

The issue of post-verdict contact with former jurors has often been raised in the context of post-verdict media interviews of jurors in high-profile cases.⁹³ These cases illustrate the conflict between criminal defendants' Sixth Amendment rights to a fair trial and an impartial jury, the media's First Amendment right to gather and distribute information to the public, jurors' rights to privacy, and traditional expectations of secrecy in jury deliberations.⁹⁴

For example, in *State v. Neulander*⁹⁵ the New Jersey Supreme Court held that media interviews with deadlocked jurors after a mistrial should

Members of the jury, the press may call you. It is up to you whether to speak with them. My suggestion is this, though: These are very grave matters. You have deliberated as a body, in confidence, and it is best that the result of your deliberations shall remain in confidence.

Id.

90. See, e.g., *United States v. Moten*, 582 F.2d 654, 666 (2d Cir. 1978) (holding that in the "unusual" case where a "series of events occurred at trial that support a reasonable suspicion that the jury may have been corrupted[,] [a]n inquiry is certainly warranted").

91. See, e.g., *United States v. Sanchez*, 380 F. Supp. 1260, 1266 (N.D. Tex. 1973) (allowing a defense lawyer to interview jurors "before the [c]ourt, in the presence of the United States Attorney, with the juror under oath and his testimony being recorded by the court reporter" because of allegations of jury misconduct).

92. See, e.g., *United States v. Harrelson*, 713 F.2d 1114, 1115, 1118 (5th Cir. 1983), *cert. denied*, 465 U.S. 1041 (1984) (holding that a ban on repeated requests for interviews was not an abuse of discretion by the trial judge).

93. See, e.g., *United States v. Brown*, 250 F.3d 907, 921 (5th Cir. 2001) (holding that jurors have a right to have their names and addresses kept confidential post-verdict in high-profile cases unless they consent otherwise); *United States v. Cleveland*, 128 F.3d 267, 270 (5th Cir. 1997) (holding that post-verdict media interviews with jurors that discuss deliberations are prohibited, but discussing general reactions is allowed); *United States v. Antar*, 38 F.3d 1348, 1364 (3d Cir. 1994) (holding that jurors may choose to give interviews with the media post-verdict, but they may not discuss the opinions of other deliberating jurors); *United States v. Moten*, 582 F.2d 654, 666 (2d Cir. 1978) (reversing a complete ban on post-verdict interviews of former jurors by the media and reserving the complete ban only in highly publicized cases that end in a mistrial and are likely to be retried); *State v. Neulander*, 801 A.2d 255, 265 (N.J. 2002), *cert. denied sub. nom.*, *Philadelphia Newspapers, Inc. v. New Jersey*, 537 U.S. 1192 (2003) (holding that the media is prohibited from contacting former jurors for post-verdict interviews, and former jurors are also prohibited from contacting the media).

94. See generally *id.*

95. 801 A.2d 255 (N.J. 2002), *cert. denied*, 537 U.S. 1192 (2003).

be restricted.⁹⁶ In this case, the defendant, a former rabbi, was charged with murder and conspiracy in connection with the death of his wife.⁹⁷ The defendant's trial was the subject of an enormous amount of media coverage, which prompted the court to issue an order that imposed several restrictions on the media during the trial.⁹⁸ One restriction prohibited the media from releasing the identity or the descriptions of jurors,⁹⁹ and another prohibited the media from contacting or interviewing jurors.¹⁰⁰ The defendant's trial later ended in a mistrial and the jurors were discharged.¹⁰¹ Shortly afterwards, five reporters were found in contempt of court for violating the order prohibiting juror interviews.¹⁰² The court agreed with the defendant's lawyer that allowing the media to interview the jurors from the first trial could give the prosecution an unfair advantage in the retrial if it was able to determine areas in which its evidence or arguments were weak.¹⁰³ However, the court's main concern was one of judicial economy.¹⁰⁴ If the jurors had provided enough information to give the prosecution an unfair advantage, the defendant may have had a Sixth Amendment issue for appeal if he had been convicted.¹⁰⁵ In addition to restricting the media from contacting jurors, the court prohibited jurors from consenting to post-verdict interviews.¹⁰⁶ The Supreme Court refused to

96. *Id.* at 274.

97. *Id.* at 257.

98. *Id.* at 258.

99. "Paragraph 13 of the Order provides: 'Neither the identity nor descriptions that would reasonably identify any juror may be publicized, in any way, unless authorized by further order of this Court.'" *Id.*

100. "Paragraph 15 of the Order provides: 'Media representatives shall not contact or attempt to interview any juror or potential juror.'" *Id.*

101. *Id.*

102. *Id.* at 279.

103. "The singular vice of disclosure of prior deliberations is its capacity for destroying the ability of the jury on retrial to deliberate on the issue of guilt or innocence free of extraneous influence." *Id.* at 259.

104. *Id.*

105. *Id.* at 272-73. Jurors often explain to the media why they deadlocked, which may be enough information to give the prosecution an "unfair advantage." See Casarez, *supra* note 67, at 517. In a study, Professor Casarez found that jurors explained their reasons for deadlocking in seventy-four percent of interviews, many times pointing out specific evidence as the reason. *Id.* In fact, Professor Casarez found that jurors are "much more likely to talk about their deliberations after a mistrial." *Id.* at 520. Of the seventy-eight articles in her study where jurors granted interviews after a mistrial, sixty-five percent specifically talked about deliberations. *Id.*

106. *Neulander*, 801 A.2d at 265. The jurors in this case did not consent to the interviews. In fact, it was the former jurors themselves who objected to being contacted by the media and requested that the judge do something about it. Jurors were subjected to

review the decision,¹⁰⁷ and as one commentator has suggested, this result “will surely invite other judges to limit or ban post-verdict interviews.”¹⁰⁸

In contrast with the *Neulander* Court, the Second Circuit Court reversed a ban on all post-verdict juror interviews in *United States v. Moten*.¹⁰⁹ During the defendant’s trial in this case, a juror was discharged for misconduct and replaced by an alternate.¹¹⁰ The defendant moved for a mistrial on the grounds that the jury was tainted, seeking permission from the court to interview the former jurors as evidence.¹¹¹ The court held that the evidence suggested a “reasonable suspicion” that the jury may have been tainted and, therefore, allowed post-verdict interviews of the jurors.¹¹² In addition, the court held that one of the only circumstances in which a complete ban on post-verdict interviews is appropriate is in “a publicized case which ends in a hung jury and is likely to be retried.”¹¹³

The difference of opinion between the *Neulander* and the *Moten* Courts illustrates the difficulty of balancing Sixth Amendment and First Amendment rights when reviewing lower court orders that have restricted post-verdict contact with former jurors. The state legislatures in Connecticut and California have also had difficulty achieving this balance.

B. State Law Attempts to Restrict Post-Verdict Contact With Jurors

Although several states have rules that in some way restrict post-verdict contact with former jurors,¹¹⁴ this subpart focuses exclusively on two states: Connecticut and California.

repeated phone calls, letters, and visits at home from the media. News vans were parked outside their homes twenty-four hours a day, and the media repeatedly telephoned or e-mailed many former jurors’ employers. In addition, one television station broadcast footage of the jurors that included their faces, and the Philadelphia Inquirer published the name of one of the jurors. *Id.* at 259.

107. *Neulander*, 801 A.2d at 255 (N.J. 2002), *cert. denied*, 537 U.S. 1192 (2003).

108. Casarez, *supra* note 67, at 504.

109. 582 F.2d 654, 667 (2d Cir. 1978).

110. *Id.* at 657.

111. *Id.* at 658.

112. *Id.* at 666-67.

113. *Id.* at 666 (quoting from 8A MOORE’S FEDERAL PRACTICE—CRIMINAL RULES ¶ 31.08(1)(b), at 31-58 n.13 (2d ed. 1977)).

114. See, e.g., ALASKA RULES PROF’L CONDUCT R. 3.10 (2005); FLA. RULES PROF’L CONDUCT R. 4-3.5(d)(4) (2005); GA. CODE PROF’L RESP. R. 7-108(D) (2005); ILL. RULES PROF’L CONDUCT R. 3.5(d) (2005); MASS. RULES PROF’L CONDUCT R. 3.5(d) (2005); MINN. RULES PROF’L CONDUCT R. 3.5(c) (2005); N.Y. CODE PROF’L RESP. DR 7-108(D) (2005).

1. Connecticut

In 1986, Connecticut became the first state to pass a law specifically prohibiting lawyers from hiring former jurors to work as trial consultants in retrials.¹¹⁵ The Connecticut legislature passed this law in response to criticism within the legal community after defense lawyer Michael Sherman hired one of the five original jurors to work as a trial consultant in the retrial of a high-profile rape case.¹¹⁶ The effects of the laws are twofold. First, the law makes a juror who receives compensation for advising or consulting in a retrial or in a separate trial “arising out of the same transaction or offense involving the same or different parties” liable for a misdemeanor.¹¹⁷ Second, the statute makes a lawyer who hires a former juror liable for aiding and abetting a misdemeanor, as well as for professional misconduct.¹¹⁸

Connecticut’s federal district courts have also taken steps to prohibit lawyers from hiring former jurors to work as trial consultants in retrials.¹¹⁹ In 1987, they adopted a rule prohibiting post-verdict contact of jurors by the parties or their lawyers “concerning the deliberations or verdict of the jury or of any individual juror in any action before, during, or after trial, except upon leave of Court which shall be granted only upon the showing of good cause.”¹²⁰ Significantly, the media is not prohibited from post-verdict contact with jurors under this rule, nor are lawyers prohibited from seeking evidence for the purpose of impeaching a verdict.¹²¹ While Connecticut’s state law and federal rule prohibiting

115. 1986 Conn. Pub. Acts 181 (codified at CONN. GEN. STAT. ANN. § 51-247(b) (West 2005)):

Prohibition on former juror serving as consultant: No person who serves as a juror in the trial of an action shall, for consideration, advise or consult with any party with respect to a subsequent retrial of such action or a separate trial arising out of the same transaction or offense involving the same or different parties. Any person who violates the provisions of this section shall be guilty of class A misdemeanor.

Id.

116. See Gombossy, *supra* note 7, at 6. The prosecutor in that case originally asked the judge to find the juror in contempt of court for violating her oath of confidentiality but the judge refused. *Id.*

117. CONN. GEN. STAT. ANN. § 51-247(b).

118. *Id.*

119. D. CONN. L. CIV. R. 83.5 (2003-04).

120. *Id.*

121. See *id.* See also Goldstein, *supra* note 46, at 305-06 (for a complete discussion of the

post-verdict contact between lawyers and jurors have endured over the years, California's law has not.

2. California

In 1994, former California Governor Pete Wilson signed the Brown-Kopp Bill into law, which, among other things, placed several restrictions on jurors from receiving compensation for discussing their experiences.¹²² In particular, the Brown-Kopp Act made hiring a former juror for over fifty dollars within ninety days of the discharge of the jury "jury tampering," a misdemeanor.¹²³ Under this law, both the jurors who accepted compensation and the lawyers who offered to pay them could be liable.¹²⁴ However, shortly after the Brown-Kopp Act went into effect, two California judges severely restricted its application when the California First Amendment Coalition ("CFAC") and a former O.J. Simpson juror, who wrote a book about the case, challenged it on First Amendment grounds.¹²⁵

effects of this rule).

122. CAL. PENAL CODE §116.5 (West Supp. 2005), stating, in relevant part:

(a) A person is guilty of tampering with a jury when, prior to, or within 90 days of, discharge of the jury in a criminal proceeding, he or she does any of the following:

(1) Confers, or agrees to confer, any payment or benefit upon a juror or upon a third person who is acting on behalf of a juror in consideration for the juror or third person supplying information in relation to an action or proceeding.

(2) Acting on behalf of a juror, accepts or agrees to accept any payment or benefit for himself or herself or for the juror in consideration for supplying any information in relation to an action or proceeding.

(3) Acting on behalf of himself or herself, agrees to accept, directly or indirectly, any payment or benefit in consideration for supplying any information in relation to an action or proceeding.

(b) Any person who violates this section is guilty of a misdemeanor.

(c) In the case of a juror who is within 90 days of having been discharged, otherwise lawful compensation not exceeding fifty dollars (\$50) in value shall not constitute a criminal violation of this section.

Id.

123. *Id.*

124. *Id.*

125. See *California First Amendment Coalition v. Lungren*, No. C 95-0440-FMS, 1995 WL 482066, at *8 (N.D. Cal. Aug. 10, 1995) (holding that section 132.5 of the California Penal Code and section 1669.7 of the California Civil Code as they applied to witnesses selling their stories were unconstitutional); *Dove Audio, Inc. v. Lungren*, No. CV 95-2570 RG (JRX), 1995 WL 432631, at *1 (C.D. Cal. June 14, 1995) (holding that section 116.5 of the California

The recently proposed Jury Integrity Act was more limited in its scope than the Brown-Kopp Act, specifically prohibiting lawyers from paying former jurors for serving as trial consultants and prohibiting former jurors from receiving compensation at the end of a trial.¹²⁶ If successful, this proposed rule would have effectively balanced the interests of jurors, lawyers, the media, and the courts, while protecting their constitutional rights, as discussed below in Part V.

V. BALANCING THE FIRST AMENDMENT WITH THE SIXTH AMENDMENT: A PROPOSED RULE

This Part recommends an approach, similar to California's proposed Jury Integrity Act, that furthers the policies behind restrictions on post-verdict contact with jurors while respecting lawyers' and jurors' First Amendment right to free speech and criminal defendants' Sixth Amendment rights to a fair trial and an impartial jury. All states should adopt a rule that encompasses the following.

Any rule restricting post-verdict contact with jurors should prohibit jurors from receiving compensation for working as consultants in the retrial or in any trial arising out of the first trial. "Compensation" should include both monetary and non-monetary forms.¹²⁷ Jurors may work as trial consultants without compensation if they so choose. "Consulting" should include, but not be limited to, the following: assisting in voir dire, discussing deliberations, giving any information about other jurors, producing visual aids, preparing witnesses, drafting prospective juror questionnaires, conducting focus groups and mock trials, completing community surveys, and handling settlement discussions.¹²⁸ The rule should have an unlimited duration.

This proposed rule, if adopted, is narrow enough that it is unlikely that a court would overturn it on constitutional grounds. In addition, the punishment for breaking this proposed rule is strict enough that it is unlikely that lawyers and jurors will disregard it. And finally, the

Penal Code was unconstitutionally overbroad as it applied to a dismissed Simpson case juror).

126. See H.R. 473, 2003-2004 Gen. Assem., Reg. Sess. (Cal. 2004) (proposed amendment to section 116.5 of the California Penal Code), available at <http://www.leginfo.ca.gov/billinfo.html>.

127. "Compensation" is defined as "[r]enumeration and other benefits received in return for services rendered; esp., salary or wages." BLACK'S LAW DICTIONARY 118 (2d Pocket ed. 2001).

128. See Yarbrough, *supra* note 20, at 1889-95 (discussing conduct that could be defined as "trial consulting").

conduct prohibited by this proposed rule effectively protects criminal defendants' Sixth Amendment rights to a fair trial and an impartial jury.

First, the conduct prohibited under this proposed rule is narrow enough that it is unlikely that a court would overturn it on constitutional grounds. The Supreme Court uses a two-step analysis to review First Amendment claims.¹²⁹ First, the Court considers whether the regulation restricts the "communicative or non-communicative impact of the expressive activity."¹³⁰ A regulation that restricts content is unconstitutional unless the state shows that it serves "compelling state interests."¹³¹ A regulation that does not restrict content is constitutional unless it "unduly hampers the flow of information."¹³² The Brown-Kopp Act was a content-based restriction on communication.¹³³ It did not effectively balance the First and Sixth Amendments; instead, it was "unconstitutionally overbroad in that it regulate[d] more speech than [was] necessary to serve the government's underlying interest."¹³⁴ Although California undeniably has a compelling state interest in protecting criminal defendants' rights to a fair trial and an impartial jury, the Brown-Kopp Act did more than just protect these Sixth Amendment rights—it crossed the line and interfered with jurors', lawyers', and the media's First Amendment right to free speech.

Like the Brown-Kopp Act, this proposed rule is a content-based restriction of jurors', lawyers', and the media's communications. Also like the Brown-Kopp Act, this proposed rule protects a compelling state interest: the Sixth Amendment rights of criminal defendants to a fair trial and an impartial jury. Unlike the Brown-Kopp Act, however, the proposed rule is not unconstitutionally overbroad.

As discussed in Part IV, broad prohibitions on post-verdict juror contact have often been overturned by the courts.¹³⁵ The proposed rule is not overbroad because it specifically targets only a juror's financial motivations to intentionally deadlock and create a mistrial to secure a consulting job in the retrial. Jurors may do a number of things under the proposed rule, some of which were prohibited under the Brown-

129. Recent Legislation, *Criminal Procedure—Witnesses and Jurors—California Enacts Ban on Receipt of Money For Information—Act of September 26, 1994*, 108 HARV. L. REV. 1214, 1216 (1995).

130. *Id.* at 1216 n.15.

131. *Id.* at 1216 n.16.

132. *Id.* at 1216 n.17.

133. See CAL. PENAL CODE § 116.5 (West. 1995).

134. Recent Legislation, *supra* note 129, at 1218.

135. See *supra* Part IV.

Kopp Act. First, jurors may speak to the media post-verdict, as well as receive compensation for writing books and appearing on television shows. Second, jurors may be interviewed post-verdict by lawyers under the direction of the court for the purpose of gathering evidence to impeach a verdict. And third, jurors may work as trial consultants in retrials without compensation. By broadly defining "compensation," the proposed rule ensures that lawyers cannot avoid liability by offering jurors non-monetary compensation, unlike the Brown-Kopp Act which defined "compensation" as any amount over fifty dollars. And by having an unlimited duration, the proposed rule ensures that lawyers may not avoid liability by arranging for the retrial to occur after the proscribed period of time, such as the ninety-day period under the Brown-Kopp Act. Thus, the conduct prohibited by the proposed rule is narrow enough that it is unlikely that a court would overturn it on constitutional grounds, but still broad enough to be effective.

Second, the punishment for breaking this proposed rule is strict enough that lawyers and jurors are unlikely to disregard it. As one commentator has noted, "gag orders" issued by judges are often ineffective.¹³⁶ Making it a crime for lawyers to compensate jurors or for jurors to accept compensation is likely enough of a threat to deter them from disregarding the proposed rule.¹³⁷ In addition, the proposed punishment under the rule is not so harsh that it violates the Eighth Amendment prohibition against cruel and unusual punishment.¹³⁸

Third, the conduct that this proposed rule prohibits effectively protects criminal defendants' Sixth Amendment rights to a fair trial and an impartial jury. Several courts have held that these rights are so important that when a criminal defendant has been deprived of them, his or her conviction should be reversed.¹³⁹ Some courts have even held

136. Casarez, *supra* note 67, at 584-85. For example, in one case involving American Airlines, the judge issued a gag order on the jurors, prohibiting them from discussing the case with anyone except their families for forty-five days. Two jurors talked to the press on the day of the verdict, and the press did not wait until the end of the forty-five days to publish the jurors' comments. *Id.*

137. Since section 54-247 of the Connecticut General Statutes was enacted, no reported cases in Connecticut exist in which a lawyer was prosecuted for hiring former jurors to work as trial consultants in the retrial.

138. U.S. CONST. amend. VIII (providing that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted").

139. See, e.g., *Sheppard v. Maxwell*, 384 U.S. 333, 354-57, 363 (1966) (reversing court's denial of defendant's habeas petition where the media severely interfered with his right to a fair trial); *Estes v. Texas*, 381 U.S. 532, 540 (1965) (reversing and remanding defendant's conviction where the media severely interfered with his Fourteenth Amendment due process right).

that the *possibility* of unfairness should be prevented.¹⁴⁰ For example, the Supreme Court has gone so far as to suggest that there are times when criminal defendants' Sixth Amendment rights should trump others' First Amendment right.¹⁴¹ In *Nebraska Press Association v. Stuart*,¹⁴² the Court stated that "[i]t is not asking too much to suggest that those who exercise First Amendment rights in newspapers or broadcasting enterprises direct some effort to protect the rights of an accused to a fair trial by unbiased jurors."¹⁴³ Just as it is not asking too much of the media to make reasonable efforts to protect criminal defendants' Sixth Amendment rights, it is not asking too much of lawyers and former jurors to make reasonable efforts to protect criminal defendants' Sixth Amendment rights.

VI. CONCLUSION

Trial consultants, while growing more commonplace and accepted among lawyers and the general public, are still controversial. The practice of lawyers hiring former jurors to work as trial consultants in retrials has added fuel to the fire. The prospect that a juror might change his or her vote to secure a consulting position in a retrial is a very real threat to criminal defendants' Sixth Amendment rights to a fair trial and an impartial jury. These rights can be protected only by laws that prohibit former jurors from accepting compensation to work as trial consultants in retrials.

Connecticut took our nation's first step towards protecting these rights with the enactment of the Sherman Act in 1986. Since then, only California has attempted to follow this lead, an attempt that first failed as a result of its overbroad restriction on the First Amendment right to free speech. California's recently proposed Jury Integrity Act, upon which my proposed rule is based, is not overbroad, but it is not cost-free either. However, it restricts the First Amendment right of jurors only to the extent necessary to prevent the possibility of an unfair and partial

140. Justice Black has stated: "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness . . ." *In re Murchison*, 349 U.S. 133, 136 (1955).

141. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 560-61 (1976).

142. 427 U.S. 539 (1976).

143. *Id.* at 560. See *Branzburg v. Hayes*, 408 U.S. 665, 685 (1972) (suggesting that the press "may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal").

jury, a restriction that has been approved by the Supreme Court.¹⁴⁴

The purpose of this Comment is to make those who are unaware of the practice of lawyers hiring former jurors to work as trial consultants in retrials familiar with the potential First and Sixth Amendment problems that may result from any restrictions on these rights. There are, of course, likely to be critics who will dismiss these potential problems, arguing that hiring former jurors to work as trial consultants in retrials is “creative lawyering” that is not technically unethical, and that the possibility that a juror will intentionally deadlock and create a mistrial to secure a consulting job in the retrial is a “long shot.” My question to these critics is this: With all the juror biases and all the hidden motives that interfere with criminal defendants’ Sixth Amendment rights in our jury system today, are we really willing to risk adding a profit motive?

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144. See, e.g., *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 560 (1976); *In re Murchison*, 349 U.S. 133, 136 (1955).

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